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Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data – Presidency compromise text

Delegations will find in the Annex Presidency compromise texts on the above proposal. Changes to document 9375/1/23 REV 1 are marked in **bold underline** and ~~strikethrough~~.

Compromise text is based on the discussions during the LEWP (Customs) meeting of 10 July 2023 and delegations' written comments.

2023/0143 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive (EU) 2016/680 of the European Parliament and of the Council¹ provides for harmonised rules for the protection and the free movement of personal data processed for the purposes of the prevention, investigation, detection or prosecution of criminal offences or execution of criminal penalties, including the safeguarding against, and the prevention of threats to, public security. That Directive requires the Commission to review relevant other acts of Union law in order to assess the need to align them with that Directive and to make, where necessary, the proposals to amend those acts to ensure a consistent approach to the protection of personal data falling within the scope of that Directive.

¹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

- (2) Council Decision 2009/917/JHA² on the use of information technology for customs purposes establishes the Customs Information System (CIS) to assist in preventing, investigating and prosecuting serious contraventions of national laws by making information available more rapidly and increase the effectiveness of the customs administrations. In order to ensure a consistent approach to the protection of personal data in the Union, that Decision should be amended to align it with Directive (EU) 2016/680. In particular, the personal data protection rules should respect the principle of purpose specification, be limited to specified categories of data subjects and categories of personal data, respect data security requirements, include additional protection for special categories of personal data and respect the conditions for subsequent processing. Moreover, provision should be made for the coordinated supervision model as introduced by Article 62 of Regulation (EU) 2018/1725³.
- (3) In particular, in order to ensure a clear and consistent approach ensuring adequate protection of personal data, the term ‘serious contraventions’ should be replaced by ‘criminal offences’ **as referred to in Article 1(1) of the Directive EU 2016/680**, bearing in mind that the fact that a given conduct is prohibited under the criminal law of a Member State in itself implies a certain degree of seriousness of the contravention. Moreover, the ~~objective~~ **purpose** of the CIS should remain limited to assisting in connection to the prevention, investigation, detection or prosecution of the criminal offences under national laws as defined in Council Decision 2009/917/JHA, that is, national laws in respect of which national customs administrations are competent and that are therefore particularly relevant in the context of customs. Therefore, whereas qualification as a criminal offence is a necessary requirement, not all criminal offences should be considered to be covered. By way of example, the covered criminal offences include illicit drugs trafficking, illicit weapons trafficking and money laundering. Furthermore, other than the introduction of the term ‘criminal offences’, this amendment should not be understood as affecting the specific requirements set out in that Council Decision regarding the establishment and sending of a list of criminal offences

² Council Decision 2009/917/JHA on the use of information technology for customs purposes (OJ L 323, 10.12.2009, p. 20).

³ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

under national laws that meet certain conditions, those requirements relating only to the particular purpose of the customs files identification database.

- (4) It is necessary to clarify the ~~respective roles of~~ **legislation applicable to the processing of personal data resulting from the maintenance and use of the Custom Information System by the Commission, Europol, Eurojust and of the Member States States competent national authorities** with regard to the personal data. The Commission is considered the ~~processor acting on behalf of the national authorities designated by each Member State, which are considered the controllers of the personal data,~~ **as well as the supervisory authorities responsible for monitoring the application of the legislation applicable to each of them.**
- (5) To ensure the optimal preservation of the data while reducing the administrative burden for the competent authorities **and in line with Article 33 of Regulation (EU) 515/1997**, the procedure governing the retention of personal data in the CIS should be simplified by removing the obligation to review data annually and by setting a maximum retention period of five years which can be increased, subject to justification, by an additional period of two years. That retention period is necessary and proportionate in view of the typical length of criminal proceedings and the need for the data for the conduct of joint customs operations and of investigations.

- (6) In accordance with Article 6a of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union (TEU) and to the TFEU, Ireland is bound by Council Decision 2009/917/JHA and is therefore taking part in the adoption of this Regulation.
- (7) In accordance with Articles 1, 2 and 2a of Protocol No 22 on the Position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (8) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 and delivered an opinion on 04/07/2023.
- (9) Council Decision 2009/917/JHA should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Council Decision 2009/917/JHA is amended as follows:

- (1) Paragraph 2 of Article 1 is replaced by the following:

‘2. The ~~objective~~**purpose** of the Customs Information System, **in accordance with this Decision,** is to assist the competent authorities in the Member States with the prevention, investigation, detection or prosecution of criminal offences under national laws, by making information available more rapidly, thereby increasing the effectiveness of the cooperation and control procedures of the customs administrations of the Member States.’

- (2) Point 2 of Article 2 is ~~hereby deleted~~**replaced by the following:**

‘2. “personal data” means personal data as defined in point (1) of Article 3 of Directive (EU) 2016/680.’

- (2a) The first sentence of Paragraph 1 of Article 3 is replaced by the following:**

‘The Customs Information System shall consist of a central database facility, accessible through terminals in each Member State. It shall comprise exclusively data necessary to achieve its purpose as stated in Article 1(2), including personal data, in the following categories:’

- (3) ~~After the first sentence of paragraph 2 of Article 3, a new sentence is added as follows:~~

~~‘In relation to the processing of personal data in the Customs Information System, the Commission shall be considered the processor, within the meaning of point (12) of Article 3 of Regulation (EU) 2018/1725, acting on behalf of the national authorities designated by each Member State, which shall be considered the controllers of the personal data.’~~

(3a) Paragraph 1 of Article 4 is replaced by the following:

‘1. Member States shall determine the items to be entered into the Customs Information System relating to each of the categories referred to in Article 3(1), to the extent that this is necessary to achieve the purpose of the System. No items of personal data shall be entered in any event within the category set out in point (e) of Article 3(1).’

(4) Paragraph 5 of Article 4 is replaced by the following:

‘5. In no case shall the special categories of personal data referred to in Article 10 of Directive (EU) 2016/680 be entered into the Customs Information System.’

(5) Paragraph 2 of Article 5 is replaced by the following:

‘2. For the purpose of the actions referred to in paragraph 1, personal data in any of the categories referred to in Article 3(1) may be entered into the Customs Information System only if there are reasonable grounds, in particular on the basis of prior illegal activities, to suggest that the person concerned has committed, is in the act of committing or will commit criminal offences under national laws.’

(5a) Paragraph 1 of Article 7 is replaced by the following:

‘1. Direct access to data entered into the Customs Information System shall be reserved to the national authorities designated by each Member State. Those national authorities shall be customs administrations, but may also include other authorities competent, according to the laws, regulations and procedures of the Member State in question, to act in order to achieve the purpose stated in Article 1(2).’

(6) Paragraph 3 of Article 7 is replaced by the following: hereby deleted.

~~‘3. Notwithstanding paragraphs 1 and 2, the Council may exceptionally, by a unanimous decision and after consultation of the European Data Protection Board, permit access to the Customs Information System by international or regional organisations, provided that both of the following conditions are met:~~

~~(a) the access complies with the general principles for transfers of personal data set out in Article 35 or, where applicable, Article 39 of Directive (EU) 2016/680;~~

~~(b) the access is based either on an adequacy decision adopted under Article 36 of that Directive or is subject to appropriate safeguards under Article 37 thereof.’~~

(7) Paragraph 1 of Article 8 is replaced by the following:

‘1. The national authorities designated by each Member State in accordance with Article 7(1) Member States, Europol and Eurojust may process personal data obtained from the Customs Information System only in order to achieve the aim purpose stated in Article 1(2), or for other purposes in accordance with Member States law adopted pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council, in particular Article 4(2) and Article 9(1) and (3) thereof, or, where applicable, Regulation (EU) 2018/1725 of the European Parliament and of the Council, in particular Article 71(2) and Article 75 thereof, and in compliance with any conditions imposed by the Member State which entered the personal data in that system in accordance with the applicable rules of Union law on the processing of personal data.

Member States, Europol and Eurojust may process non-personal data obtained from the Customs Information System in order to achieve the aim purpose stated in Article 1(2) or for other purposes, including administrative ones, in compliance with any conditions imposed by the Member State which entered the non-personal data in that system.’

(7a) Paragraph 2 of Article 8 is replaced by the following:

2. Without prejudice to paragraphs 1 and 4 of this Article, Article 7(3) and Articles 11 and 12, data obtained from the Customs Information System shall only be used by national authorities in each Member State designated by the Member State in question, which are competent, in accordance with the laws, regulations and procedures of that Member State, to act in order to achieve the purpose stated in Article 1(2).

(8) Paragraph 4 of Article 8 is replaced by the following:

‘4. Personal data obtained from the Customs Information System may, with the prior authorisation of, and subject to compliance with any conditions imposed by, the Member State which entered that data into that system, be:

- (a) transmitted to, and further processed by, national authorities other than those designated under paragraph 2, in accordance with **Union or Member States law on the processing of personal data** ~~the applicable rules of Union law on the processing of personal data;~~ or
- (b) transferred to, and further processed by, the competent authorities of third countries and international or regional organisations, in accordance with **Member States law adopted pursuant to** Chapter V of Directive (EU) 2016/680 and, where relevant, with Chapter ~~V~~**IX** of Regulation (EU) 2018/1725.

Non-personal data obtained from the Customs Information System may be transferred to, and further processed by national authorities other than those designated under paragraph 2, third countries, and international or regional organisations, in compliance with any conditions imposed by the Member State which entered the non-personal data in that system.’

(8a) Paragraph 5 of Article 13 is replaced by the following:

‘5. Subject to this Decision, where in any Member State a court, or other competent authority within that Member State, makes a final decision as to amendment, supplementation, rectification or erasure of data in the Customs Information System, the Member States undertake mutually to enforce such a decision. In the event of conflict between such decisions of courts or other competent authorities in different Member States, including those referred to in Articles 26 and 26a, concerning rectification or erasure, the Member State which entered the data in question shall erase them from the System.’

(9) Article 14 is replaced by the following:

‘Personal data entered into the Customs Information System shall be kept only for the time necessary to achieve the ~~aim~~**purpose** stated in Article 1(2) and may not be retained for more than five years. However, exceptionally, that data may be kept for an additional period of at most two years, where and insofar as a strict need to do so in order to achieve that ~~aim~~**purpose** is established in an individual case.’

(9a) Paragraph 2 of Article 15 is replaced by the following:

‘2. The purpose of the customs files identification database shall be to enable the national authorities responsible for carrying out customs investigations designated pursuant to Article 7, when opening a file on or investigating one or more persons or businesses, and for Europol and Eurojust, to identify competent authorities of other Member States which are investigating or have investigated those persons or businesses, in order, through information on the existence of investigation files, to achieve the purpose referred to in Article 1(2).’

(10) Paragraph 3 of Article 15 is replaced by the following:

‘3. For the purposes of the customs files identification database, each Member State shall send the other Member States, Europol, Eurojust and the Committee referred to in Article 27 a list of criminal offences under its national laws.

This list shall comprise only criminal offences that are punishable:

- (a) by deprivation of liberty or a detention order for a maximum period of not less than 12 months; or
- (b) by a fine of at least EUR 15 000.’

(11) Article 20 is replaced by the following:

~~‘Directive (EU) 2016/680 shall apply to the processing of personal data under this Decision.’~~

‘1. Without prejudice to this Decision, national provisions adopted pursuant Directive (EU) 2016/680 shall apply to the processing of personal data under this Decision by national authorities designated by each Member State in accordance to Article 7;

2. Without prejudice to this Decision, Regulation (EU) 2018/1725 shall apply to the processing of personal data under this Decision by the European Commission

3. Without prejudice to this Decision, Regulation (EU) 2016/794 shall apply to the processing of personal data under this Decision by Europol

4. Without prejudice to this Decision, Regulation (EU) 2018/1727 shall apply to the processing of personal data under this Decision by Eurojust.’

(12) Articles 22, 23, 24 and 25 are hereby deleted.

(13) Article 26 is replaced by the following:

~~'Coordinated supervision among national supervisory authorities and the European Data Protection Supervisor shall be ensured in accordance with Article 62 of Regulation (EU) 2018/1725.'~~

'The independent supervisory authorities designated in each Member State and endowed with the powers referred to in Chapter VI of Directive (EU) 2016/680 shall monitor the lawfulness of the processing of personal data in CIS on their territory, its transmission from their territory and the exchange and further processing of supplementary information on their territory.'

(13a) A new Article 26a is added as follows:

'The European Data Protection Supervisor shall be responsible for monitoring the processing of personal data by the Commission, Europol and Eurojust and for ensuring that it is carried out in accordance with this Decision. The tasks and powers referred to in Articles 57 and 58 of Regulation (EU) 2018/1725 shall apply accordingly.'

(13b) A new Article 26b is added as follows:

'Coordinated supervision among national supervisory authorities and the European Data Protection Supervisor shall be ensured in accordance with Article 62 of Regulation (EU) 2018/1725.'

(13c) Point (a) of paragraph 2 of Article 27 is replaced as following:

'(a) for the implementation and correct application of the provisions of this Decision, without prejudice to the powers of the authorities referred to in Articles 26 and 26a;'

(14) In paragraph 2 of Article 28, the following points are added:

- '(i) to ensure that installed systems may, in the case of interruption, be restored;
- (j) to ensure that the functions of the system perform, that the appearance of faults in the functions is reported and that stored personal data cannot be corrupted by means of a malfunctioning of the system.'

(14a) Paragraph 3 of Article 27 is replaced as following:

‘3. The Committee referred to in Article 27 shall monitor queries of the Customs Information System for the purpose of checking that searches made were admissible and were made by authorised users. At least 1 % of all searches made shall be checked. A record of such searches and checks shall be maintained in the System and shall be used only for the abovementioned purpose by that Committee and the supervisory authorities referred to in Articles 26 and 26a. It shall be erased after six months.’

(14b) Article 29 is replaced as following:

‘The competent customs administration referred to in Article 10(1) shall be responsible for the security measures set out in Article 28, in relation to the terminals located in the territory of the Member State concerned, the review functions set out in Article 14 and Article 19, and otherwise for the proper implementation of this Decision so far as is necessary under the laws, regulations and procedures of that Member State.’

(15) Paragraph 1 of Article 30 is hereby deleted.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President